Supreme Court, U. S.
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APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-6568

JOHNNIE B. HANKERSON, PETITIONER,

v.

STATE OF NORTH CAROLINA, RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

PETITION FOR CERTIORARI FILED APRIL 12, 1976
CERTIORARI GRANTED OCTOBER 4, 1976

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224-112—76——1

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DOCKET ENTRIES

1. District Court of Nash County, North Carolina, September 29, 1974, Warrant for Arrest of Petitioner charging him with the unlawful, willful, and felonious murder of Gregory Eugene Ashe with malice aforethought on the 29th day of September, 1974.
2. Superior Court of Nash County, North Carolina—On November 20, 1974 Petitioner and his attorney W. O. Rosser waived the finding and returning into Court of a bill of indictment and agreed that the case be tried upon information alleging that on or about the 29th day of September, 1974 in Nash County, Johnnie B. Hankerson unlawfully and willfully did feloniousy and with malice by the use of a deadly weapon, to wit a pistol, kill and murder Gregory Eugene Ashe contrary to the form of the Statute in such case made and provided and against the peace and dignity of the State.
3. Superior Court of Nash County, North Carolina—At the November 11, 1975, Session, upon his plea of not guilty, Petitioner was tried and convicted of Second Degree Murder. In the same Court on the 21st day of November, 1974 Presiding Judge John Webb ordered the Petitioner imprisoned for the term of not less than twenty nor more than twenty-five years in the State's Prison.
4. Superior Court of Nash County, North Carolina—In apt time, Petitioner objected and excepted to the rulings and Judgment of the trial court and gave Notice of Appeal to the North Carolina Court of Appeals with further notice being waived on November 21, 1974.
5. Superior Court of Nash County, North Carolina—Order of Assignment of Counsel, W. O. Rosser and L. G. Diedrick to appeal Petitioner's case to the appellate courts of North Carolina, November 21, 1974.

2 6. North Carolina Court of Appeals, May 29, 1975—Oral argument on Petitioner's appeal.

7. North Carolina Court of Appeals. July 16, 1975—Decision upholding the Judgment of the trial court, *Arnold, J.*, dissenting; decision certified July 28, 1975, reported in 26 NC App. 575, 217 S. E. 2d 9 (1975).
8. Supreme Court of North Carolina, July 31, 1975—Petitioner filed Notice of Appeal from the North Carolina Court of Appeals to the Supreme Court of North Carolina as a matter of right pursuant to North Carolina General Statute 7A–30 (2).
9. Supreme Court of North Carolina, August 19, 1975—Petitioner filed Motion to Amend the record to note additional Exceptions and Assignments of Error which would raise for review additional questions suggested by this Court in *Mullaney* vs. *Wilbur*, 421 US 684 (1975), decided June 9, 1975.
10. Supreme Court of North Carolina, September 2, 1975—Petitioner's Motion to Amend the Record to note additional Exceptions and Assignments of Error allowed.
11. Supreme Court of North Carolina, September 10, 1975—Oral argument on Petitioner's appeal.
12. Supreme Court of North Carolina, December 17, 1975—Decision filed denying Petitioner's appeal, reported in 288 NC 632 (1975).
13. Supreme Court of the United States—Petitioner's Application for an Extension of Time In Which to File Petition for Writ of Certiorari allowed extending said time to April 15, 1976 by Order of Chief Justice Burger, dated March 12, 1976.
14. Supreme Court of the United States, April 12, 1976, Petition for Writ of Certiorari docketed.
15. Supreme Court of the United States, October 4, 1976—Petitioner's Motion For Leave to Proceed In Forma Pauperis and Petition for Writ of Certiorari granted.

STATE OF NORTH CAROLINA v. JOHNNIE B. HANKERSON

Charge to the Jury

[Printed in the Case and Record on Appeal in the Supreme Court of North Carolina beginning at Page 52]

Ladies and Gentlemen, you have now heard all the evidence in the case and the arguments of the lawyers, and it is now my duty to charge you as to the law that arises on the evidence, at the end of which time I will let you retire and render your verdict.

This is a criminal action in which the defendant, Johnnie B. Hankerson, has been charged on an Information that he did commit second degree murder against Gregory Ashe. To this charge the defendant has pled not guilty, and the fact that he has been charged is no evidence that he is guilty. Under our system, when a person is charged with a crime and he pleads not guilty he does not have to prove that he is innocent, he is presumed to be innocent, and the burden of proof is on the State to prove beyond a reasonable doubt that he is guilty before you can find him guilty.

When I speak of a reasonable doubt I don't mean a vain, a fanciful or an imaginary doubt, but I do mean a sane or a rational doubt. If, after a consideration of all the evidence, you are fully satisfied or entirely convinced to a moral certainty that the defendant is guilty, then you would be satisfied beyond a reasonable doubt. On the other hand, if you have any doubt based on reason and common sense, arising out of some or all the evidence that has been presented, or lack of evidence as the case may be, as to any fact necessary to constitute the guilt of the defendant, then you would have a reasonable doubt, and it would be your duty to give the defendant the benefit of that doubt and find him not guilty.

I am going to recount for you some of the evidence that has been presented in the case but in doing so I want to instruct you

I am not trying to tell you what the evidence is or how I think you should find the facts from the evidence. Indeed, I have no opinion as to whether you should find the defendant guilty or not guilty in this case. And if your recollection of the evidence differs from my recollection, it would be your duty to reject my recollection and use your own recollection, because you are the sole triers of fact in this case. My sole purpose in recounting some of the evidence for you is so that I can apply the law that arises on the evidence.

In this case the State has introduced first of all in the form of testimony by Lorenzo Donald Dancy, who testified that he is sometimes called "Low," that he is 18 years old and knew Gregory Ashe, that he was a close friend of his. He testified that on September 29, 1974 he was with Gregory Ashe, that he had met him that night at a place is Whitakers, North Carolina, called Bandy's Place; that he met him there sometime around 10:30 or 11:00 o'clock P.M., and that Bandy's was mostly a dance hall, and that "Greg," as he called the deceased was with Wilbert Whitley and that they stayed there at Bandy's about 25 minutes; that he does not know Johnnie Hankerson and did not see him that night; that he does know that Johnnie Hankerson drives a black and yellow Plymouth automobile. That he, Wilbert and Greg Ashe left Bandy's in Greg's automobile, that they were going to a club and stopped by a poolroom on the way, that they got out of the car, the poolroom was locked and they couldn't get in, and that they went back to Greg's car and Gregory Ashe couldn't get the car started, so all of three of them got out and started down a path and he was on his way home; that Greg Ashe was walking with them and then he, Gregory Ashe, turned and went back to his car, and they walked a little way and then when they hadn't walked very far Wilbert was in front of him and he heard a shot and that he heard Gregory Ashe holler that he had been shot. That he then ran back to where he heard the shot from and he saw a yellow and black Plymouth Satellite pull off, that it went through an intersection at a fast rate of speed and drove out to Highway 301 and turned on the highway and left. That he ran to Alfonse Bellamy's girl friend's house and that he went inside; that first of all he called Wilbert's home from Alfonse Bellamy's girl friend's house but he didn't answer so then he went to the store and found Wilbert and then they went back to look for Greg; that at first they couldn't find

him but then they found him lying in a field flat on his face, that some man who was there with them felt him to see if he was still alive, and that about that time Gregory's mother arrived and the police arrived, and that when they found Gregory Ashe's body he had a cigarette in his hand that had been lit, and that Gregory Ashe's mother took the cigarette. He testified that he had never seen Gregory Ashe with a knife like the one introduced in evidence as one of the exhibits in this case. That he did hear Gregory Ashe ask for a light just before he left him that night and no one had a light, and that when they found his body the cigarette had been lighted but it had gone out.

The State then introduced evidence in the form of testimony by Wilbert Whitley, who testified that he is 24 years old, that he lives in Witakers, North Carolina, that he knew Gregory Ashe before Gregory Ashe died; that he had never seen Gregory Ashe with a knife like the one introduced in evidence; that he got up with Gregory Ashe that night at his own home, that is, at Wilbert Whitley's home, and they went to the "Cut" and the first place they went was to Robert Earl Bandy's in the "Cut," which is part of Whitakers, North Carolina; that Wilbert Whitley had not had anything to drink that night and he could not tell if Gregory Ashe had; that they left Bandy's Place and went to a poolroom; that he saw the defendant that night at the "Cut"; that when they left Bandy's that Lorenzo Dancy went with them, that they first of all went to a poolroom which was closed and when they cut the car off Greg couldn't get the car started when they started to leave the poolroom and that Wilbert Whitley told them that he was going on home and that he walked on across the intersection and while he was walking towards the intersection he saw a car light coming from behind him and that there was nothing unusual about it, that he heard a gun go off, that he turned and looked back and a yellow and black automobile was taking off and cutting the corner and went out onto 301 and drove off, and that it was a yellow and black Satellite, and that he heard Lorenzo Dancy yell that Greg said he was shot; that he ran back but they couldn't find Greg; that they then went to Evans Store and got some help and then they went back and Lorenzo Dancy came up with Alfonse Bellamy and that they found the body after hunting for it for about half an hour; that he stayed there until about 4:00 A.M. himself. That earlier that night Gregory Ashe had asked for a match but no one had

one; that Gregory Ashe had a cigarette when they did find his body and the cigarette had been lit.

The State then introduced evidence in the form of testimony by Alfonse William Bellamy, who testified that he lives in the "Cut" in Whitakers, North Carolina, and that he knew Gregory Ashe like a brother, that he had known him for about one year, and he knew Gregory Ashe would never carry a knife like the one introduced into evidence because it slips from the hand too easily. That on the night of September 29, 1974, "Low" came and told him that Greg had been shot, and that he went to the place where he said he had been shot and that he got in Greg's car, that he knew how to start it, and after he was able to start it he turned around and after some searching they turned the lights into a certain direction and Gregory Ashe's body was under the headlights; that Gregory Ashe was lying on his face, or the body of Gregory Ashe was, and that when they turned him over that he had a cigarette in his hand; that everyone including Gregory Ashe's mother arrived at about the same time.

The State then introduced evidence in the form of testimony by Etheline Lyons, who testified that she was the mother of Gregory Ashe and she lives in Bloomer Hill in Whitakers, North Carolina; that at about 11:00 o'clock P.M. that night she heard Gregory Ashe talking and then she heard his automobile start, and that about 30 minutes later someone knocked on the door and told her that her son had been shot; that she went out looking for him and after looking for him for a while they found his body on Bloomer Hill lying facedown, and when they turned him over he had a cigarette in his hand.

The State then introduced evidence in the form of testimony by M. M. Reams, who testified that he is a deputy sheriff with
the Nash County Sheriff's Department; that he received
7 a radio message at about 12:05 A.M. on September 29,
1974; that he went to Bloomer Hill in Whitakers, North Carolina, that night and when he arrived there he saw the body of Gregory Ashe and he was lying facedown; that at about that time he received a call and he left the scene and went to Battleboro and met a State Trooper and Lorenzo Dancy; that after taking a statement from Dancy he checked on the registration of the Satellite Plymouth and it belonged to the defendant; that he then drove to the defendant's home, he advised him of his rights, and the defendant told him that he had shot at a

person but he didn't know whether he had hit him or not, and he said that Mr. Hankerson told him that this person he had shot at had grabbed him and tried to cut his throat; that he did observe some blood on the automobile on the driver's side. Mr. Reams testified that after searching the car he found a knife in the car that had some wood on it, and that the defendant showed him a greasy spot on his sweater where he said a boy had grabbed him; that Mr. Hankerson told him that he was in the process of buying the gun that he had used and that he had returned it to the person he was buying it from, and that was the only statement he made to him about the gun; that he then brought the defendant to Nashville and placed him in the Nash County Jail and went back to the scene in Whitakers where they had found the body and continued his investigation. Mr. Reams testified on cross-examination that Johnnie Hankerson had told him that someone had tried to rob him, that he was in his automobile that night and that someone had asked for a light and he stopped the car and reached over and pushed the cigarette lighter in and then handed the cigarette lighter to the person who had asked for it, and when he put the cigarette lighter back that the man had a knife at his throat and that he had a gun on the seat beside him and he picked up the gun and fired and didn't know whether he had hit him or not.

That is some of the evidence for the State in the case. The defendant has introduced evidence. He, first of all testified in his own behalf, and he testified that his name is Johnnie Hankerson, that he lives in Battleboro, North Carolina, that he is 53 years old, that he now works for Koppers Lumber Company, and that he worked for 11 years when he first came to Whitakers from Elizabeth City for Stinson Lumber Company, then he
went to Tennessee for six months, then he came back to
8 Battleboro and has worked there since that time, or has
worked in North Carolina since that time. The he was in Whitakers on the night of September 29, 1974; that he went there by himself, that he first went to Bandy's, left there and then he went to the trailer of "Big Mama" and that he stayed there for about five minutes, that he left "Big Mama's" trailer and he started driving back towards Highway 301; that there were some water holes in the road and he was driving slowly and he heard someone ask for a light; that he stopped his car and put his car cigarette lighter in and that he saw two people there and that when he got the lighter out and gave the person

a light and when he put it back in where it was supposed to go that the person standing on the driver's side of the car grabbed him and he had a knife and he put the knife to his throat and that he reached down and picked up a gun that he had on the seat and fired, and then he drove off and drove home and went in the house and told his wife what had happened; that he didn't even look at his automobile when he got home, that he was so frightened.

And he testified that the knife introduced into evidence in this case was not his knife, and that he told his wife and son what happened that night, and that the pistol introduced into evidence was one which he was in the process of buying and that the pistol was in his house when the law came but he did not tell the deputy sheriff that the pistol was there; that at that time he didn't know whether he had hit the man he had shot at or not, that he didn't know until after the officers told him.

He testified on cross-examination that he shot two men before and each time in self-defense, that he has been convicted of whiskey some 20 years ago, and that he was convicted of escaping from prison about 40 years ago. He testified on redirect examination that he was protecting himself when he killed Gregory Ashe.

The defendant then introduced evidence in the form of testimony by Annie Hankerson, who testified that she is the wife of Johnnie Hankerson and has been for 35 or 40 years, that they have six children, that four of them are in the
9 courtroom with them today; that Johnnie Hankerson never goes out of the house with soiled clothes on and that the jacket which was introduced into evidence was clean when he left the house that night; that the defendant came in that night after having left and said, "Where is Mama?" and that he talked to her and told her that he stopped to give someone a light and when he did that the boy was reaching around him with a knife and that he shot, he didn't know whether he shot him but he shot at him, and he said maybe he ought to go back and tell the law, but he said, "If I shot someone, the law will be here and let me know about it." That she heard him tell her son W. B. about it also. On cross-examination she testified that she had been working that day and when he left the house that night he went to see someone about a hat, that the hard hat he was wearing didn't fit him right and he wanted another one, and that he was gone about two hours.

The defendant then introduced evidence in the form of testimony by Webster Hankerson, who testified that he is the son of the defendant, that he saw him when he went to his father's house that night, that his father came in and told him he had shot someone, and his father then left the room and went and talked to his mother; that his father as he went back with his mother told Webster Hankerson that if the law came to let him know. That sometime later the Sheriff came to the house and he went and got his mother and got his father. He testified that his father told him that he had shot at someone but did not know if he had hit him.

The defendant then introduced evidence in the form of testimony by Sonny Warner, who testified that he lives in Goldsboro, North Carolina, that he has known the defendant since 1965 and that he has a good general character and reputation in the community in which he lives.

The defendant then introduced evidence in the form of testimony by W. H. Needham of Rocky Mount, North Caro-
10 lina, who testified that he has known the defendant since 1965 and that the defendant has a good character and reputation.

The defendant also introduced evidence in the form of testimony by Jerry Bullock, who testified that he has known the defendant eight to ten years and that he has a good character and reputation.

That is some of the evidence as presented in the case. As I told you, you will recall what all the evidence is and you will recall what all the evidence is and you will decide the facts of the case from the evidence.

I charge you that under the law and evidence in this case it is your duty to return one of the following three verdicts. You must either find the defendant guilty of second degree murder or guilty of voluntary manslaughter or not guilty.

I charge that for you to find the defendant guilty of second degree murder, the State must prove two things beyond a reasonable doubt, first, that the defendant intentionally and without justification or excuse and with malice shot Gregory Ashe with a deadly weapon. Malice is not only hatred, ill-will or spite, as it is ordinarily understood, to be sure that is malice, but it always means that condition of mind which prompts a person to take the life of another intentionally or to intentionally inflict a wound with a deadly weapon upon another

which proximately results in his death without just cause, excuse or justification. A pistol, a .38 caliber pistol a pistol would be a deadly weapon. The second thing the State must prove and prove to you beyond a reasonable doubt is that the shooting was the proximate cause of Gregory Ashe's death. A proximate cause is a real cause, a cause without which Gregory Ashe's death would not have occurred. As I recall the evidence, both the State and the defendant stipulated that the death was caused by cerebral hemorrhage which resuled from a bullet wound in the deceased's heart. Nevertheless, you will have to be satisfied from the evidence and beyond a reasonable doubt that this shooting was the proximate cause of Gregory Ashe's death before you can find the defendant guilty in this case.

If the State proves beyond a reasonable doubt or it is admitted that the defendant intentionally killed Gregory
11 Ashe with a deadly weapon, or intentionally inflicted a wound upon Gregory Ashe with a deadly weapon, that proximately caused his death, the law raises two presumptions; first, that the killing was unlawful, and second, that it was done with malice. Then, nothing else appearing the defendant would be guilty of second degree murder. In other words, if you are satisfied from the evidence and beyond a reasonable doubt that the defendant intentionally killed Gregory Ashe with a deadly weapon, or that he intentionally inflicted a wound on Gregory Ashe with a deadly weapon and that wound proximately caused Gregory Ashe's death, then, as I told you, the law would raise two presumptions, that the killing was unlawful and second, that it was done with malice. Then there will be some other things I will charge you about, but, nothing else appearing, if you are satisfied of those two things beyond a reasonable doubt then you would find the defendant guilty of second degree murder.

As I told you, you will have to either find the defendant guilty of second degree murder or manslaughter or not guilty. In order to reduce the crime from second degree murder to manslaughter, the defendant must prove not beyond a reasonable doubt but simply to your satisfaction that there was no malice on his part. And in order to excuse his act altogether on the grounds of self-defense, the defendant must prove not beyond a reasonable doubt but simply to your satisfaction that he acted in self-defense. And I will charge you on self-defense in just a moment. But I do want to charge you that to negate

malice and thereby reduce the crime to manslaughter, the defendant must satisfy you of three things: first, that he shot Gregory Ashe in the heat of a passion, and this does not mean mere anger, it means that the defendant's state of mind was at the time so violent as to overcome his reason, so much so that he could not think to the extent necessary to form a deliberate purpose and control his actions. The second thing he must satisfy you of is that this passion was provoked by acts of Gregory Ashe which the law regards as adequate provocation. This may consist of anything which has a natural tendency to produce such passion in a person of average mind and dis-
12 position. And thirdly, that the shooting took place so soon after the provocation that the passion of a person of average mind and disposition would not have cooled.

To excuse the killing entirely on the grounds of self-defense, and the defendant contends that if you are satisfied beyond a reasonable doubt that he intentionally shot Gregory Ashe thereby proximately causing his death that he is excused in this case because he was acting in self-defense, and I want to instruct you that to excuse this killing entirely on the grounds of self-defense the defendant must satisfy you of four things: first, that it appeared to the defendant and he believed it to be necessary to shoot Gregory Ashe in order to save himself from death or great bodily harm. The defendant testified that at the time he shot Gregory Ashe or shot at Gregory Ashe that Gregory Ashe was holding a knife at his throat and had his arm around him, and he contends that that should satisfy you that he believed it was necessary to shoot him in order to save himself from death or great bodily harm. The second thing that you must be satisfied of—excuse me—that the defendant must satisfy you of is this, that the circumstances as they appeared to him at the time were sufficient to create such belief in the mind of a person of ordinary firmness, and it is for you, the jury, to determine the reasonableness of the defendant's belief from the circumstances as they appeared to him at the time. In making this determination you should consider the circumstances as you find them to have existed from the evidence, including the size, age and strength of the defendant as compared to Gregory Ashe, the fierceness of the assault, if any, upon the defendant, whether or not Gregory Ashe had a weapon in his possession. And the third thing the defendant must satisfy you of is that he was not the aggressor. If he

voluntarily and without provocation entered into a fight with Gregory Ashe, he was the aggressor, unless he thereafter attempted to abandon the fight and gave notice to Gregory Ashe that he was doing so. One enters a fight voluntarily if he uses towards his opponent abusive language which considering all the circumstances is calculated and intended to bring on a fight. And the fourth thing that the defendant must satisfy you of is that he did not use excessive force, that is, more force
13 than reasonably appeared to be necessary to the defendant at the time. Again, it is for you, the jury, to determine the reasonableness of the force used by the defendant under all the circumstances as they appeared to him at the time.

If you find that the defendant acted properly in self-defense, he would not be guilty. However, if the defendant though otherwise acting in self-defense used excessive force, the defendant would be guilty of voluntary manslaughter.

In this case the defendant has introduced evidence that he is a man of good character and reputation. I won't recount all of that again for you but you will recall the witnesses who testified that the defendant was a man of good character and reputation. I want to charge you that you can consider this evidence in two ways, or you may consider it for two purposes. First, if you believe all or any part of this evidence and find that it bears upon the defendant's truthfulness, you may consider it together with all other facts or circumstances bearing upon his truthfulness in deciding whether you will believe or disbelieve his testimony at this trial. And secondly, you may consider this evidence, although good character or good reputation is not an excuse for crime, the law recognizes that a person of good character may be less likely to commit a crime than one who lacks that character. Therefore, if you believe from the evidence that the defendant has a good character, you may consider this fact in your determination of the defendant's guilt or innocence and give it such weight as you decide it should receive in connection with all of the other evidence. There is also some evidence in this case, and I won't recount all of that again for you, that the defendant some years ago has pled guilty to some other crimes. He testified that he had once been convicted of escape and once he was convicted of assault, and you will recall the things he said he had been convicted for.

I want to charge you that you may consider that evidence in one way only and that is considering the nature of the crimes

which the defendant testified he had been convicted of
14 or pled guilty to, if you think that that bears upon his truthfulness then you may take that into account in deciding whether you believe or disbelieve him as a witness. But you may not consider that evidence in determining the guilt of the defendant in this case; that is, do not find him guilty in this case because he has pled guilty to another crime or been found guilty of another crime at another time.

The State contends that the defendant ran from the scene that night or drove away from the scene that night and did not return, did not report it to the police, and the State contends that that is evidence of flight by the defendant. Evidence of flight, if you believe that evidence, may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show a consciousness of guilt. However, proof of this circumstance is not sufficient, in itself, to establish the defendant's guilt. So if you believe the evidence of flight, I want to instruct you not to find the defendant guilty on that evidence alone; you will have to consider that together with all other evidence in the case in determining whether the State has satisfied you beyond a reasonable doubt that the defendant is guilty of either of the two crimes of which you may find him guilty, if you do not find him not guilty.

COURT: Is there anything else you want charged, Mr. Rosser?

MR. ROSSER: No, sir.

So I charge you, Ladies and Gentlemen, if you find from the evidence and beyond a reasonable doubt that on or about September 29, 1974, the defendant, Johnnie B. Hankerson, intentionally and with malice and without justification or excuse, shot Gregory Ashe with a deadly weapon, thereby proximately causing Gregory Ashe's death, nothing else appearing, it would be your duty to return a verdict of guilty of second degree murder. However, if you do not so find, or have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of second degree murder.
15 If you do not find the defendant guilty of second degree murder, you must consider whether he is guilty of voluntary manslaughter. And if you find from the evidence beyond a reasonable doubt that on or about September 29, 1974, the defendant, Johnnie B. Hankerson, intentionally shot

Gregory Ashe with a deadly weapon, thereby proximately causing Gregory Ashe's death, but are satisfied that the defendant killed without malice in the heat of sudden passion, nothing else appearing, or used excessive force in exercising the right of self-defense, it would be your duty to return a verdict of guilty of voluntary manslaughter. However, if you do not find, or have a reasonable doubt as to one or more of these things, you would find the defendant not guilty.

I will let you retire in just a moment. I suggest that when you do retire you appoint one of your members a foreman so that he or she could poll you in the jury room and speak for you when you return.

You will have to reach a unanimous verdict before you can find the defendant either guilty of second degree murder or manslaughter or not guilty.

If you want any further instructions, you are entitled to have them. However, you will all have to come back to the courtroom to get them; you can't send one person back to get them for you and you can't get the deputy sheriff to get them for you.

So at this time I instruct you, Ladies and Gentlemen, to retire to your room and render a true and just verdict.

(JURY RETIRES AT 3:43 O'CLOCK P.M.)

(JURY RETURNS TO THE COURTROOM FOR FURTHER INSTRUCTIONS AT 4:32 O'CLOCK P.M. AND THE FOLLOWING PROCEEDINGS ARE HAD.)

CLERK: Ladies and Gentlemen of the Jury, have you agreed upon your verdict?

JURY FOREMAN: No. We would like to have the Judge to clarify again the difference between manslaughter and second degree murder.

COURT: All right. Excuse me. I thought you had reached a verdict. Second degree murder is the intentional killing without justification or excuse and with malice. Voluntary manslaughter is the intentional killing without justification and excuse and without malice. In other words, the difference between second degree murder and manslaughter is the absence of malice in manslaughter. I defined malice for you. I
16 will be glad to define it for you again if you want me to.

Also, I want to instruct you that the charge I gave you as to self-defense would apply equally to manslaughter as it would to second degree murder in that if you find the defendant was justified or excused in the killing because he was acting

in self-defense then you would find him not guilty as to either one. I explained to you a little bit more maybe than you asked, but I thought you needed that clarified, perhaps. Is that enough explanation or would you like further explanation? Well, I will define malice for you. The difference between second degree murder and manslaughter, as I told you, is that it is not necessary for the State to prove malice in order for you to find him guilty of manslaughter. As I told you before, malice is not only hatred, ill-will or spite, as it is ordinarily understood, to be sure that is malice, but it also means that condition of mind which prompts a person to take the life of another intentionally, or to intentionally inflict a wound with a deadly weapon upon another which proximately causes his death without just cause, excuse or justification. That is the legal definition of malice.

Unless you want further instructions, I will let you retire and resume your deliberations. If you want any further instructions. don't hesitate to come out and ask for them.

STATE OF NORTH CAROLINA v. JOHNNIE B. HANKERSON

No. 56

(Filed 17 December 1975)

1. Criminal Law § 90— State's introduction of exculpatory statements by defendant

The State is not bound by the exculpatory portions of a confession which it introduces in a homicide case if there is other evidence tending to throw a different light on the circumstances of the homicide.

2. Homicide § 21— second degree murder—exculpatory statements—sufficiency of evidence for jury

The State's evidence was sufficient for the jury in this prosecution for second degree murder, notwithstanding the State introduced exculpatory statements by defendant that he shot the victim while the victim was reaching into defendant's car with a knife at defendant's throat and a hand on his chest, where the State's evidence cast doubt on defendant's version by tending to show that (1) defendant fled the scene at a great rate of speed; (2) defendant originally lied about the gun used in the shooting and told the truth about it after his wife turned it in to the police; (3) deceased had no grease on his hands although defendant claimed a grease spot on his shirt was from being grabbed by the victim; (4) the victim was found with a cigarette in one hand although defendant contended the victim used two hands against him; (5) the victim was right handed and defendant claimed the victim wielded the knife with his left hand; (6) defendant said he was stopped by two persons while the State's evidence was that the victim was alone; and (7) the victim had never been seen with a knife similar to one recovered from defendant's vehicle.

3. Criminal Law § 86— prior misconduct — question is good faith

Defendant failed to show that the district attorney's question to him on cross-examination as to how many people he had shot before was asked in bad faith.

4. Criminal Law § 162—failure to strike testimony—absence motion to strike

The trial court did not err in failing to strike defendant's testimony regarding prior arrests which did not result in conviction where there was no motion to strike such testimony.

18 5. Criminal Law § 113—recapitulation of evidence—misstatement—collateral matter

The trial court's inaccurate statement during recapitulation of the evidence in a homicide case that defendant testified he had been convicted of assault was a misstatement upon a collateral matter and not a ground for a new trial since no request for correction was made before the case was submitted to the jury.

6. Homicide § 28— final mandate — absence of acquittal by self-defense — additional instructions

In this homicide prosecution, the trial court's error in failing to include in its final mandate the theory of acquittal by reason of self-defense was cured by additional instructions given by the court after the jury had begun its deliberations.

7. Homicide §§ 14, 24— absence of malice — self-defense — burden of proof on defendant — unconstitutionality — nonretroactivity

Under the decision of *Mullaney v. Wilbur*, 421 U.S. 684 (1975), the Due Process Clause of the Fourteenth Amendment prohibits the use of our long-standing rules in homicide cases that, in order to rebut the presumption of malice, defendant must prove to the satisfaction of the jury that he killed in the heat of a sudden passion, and in order to rebut the presumption of unlawfulness, defendant must prove to the satisfaction of the jury that he killed in self-defense. However, the *Mullaney* decision is not retroactive and applies only to trials conducted on or after 9 June 1975.

8. Homicide §§ 14, 24— presumption of malice and unlawfulness — constitutionality

The *Mullaney* decision does not preclude use of the presumptions of malice and unlawfulness upon proof beyond

a reasonable doubt of a killing by the intentional use of a deadly weapon; nor does it prohibit making the presumptions mandatory in the absence of contrary evidence or permitting the logical inferences from facts proved to remain and be weighed against contrary evidence if it is produced.

Justice LAKE concurring in result.

APPEAL by defendant pursuant to N. C. Gen. Stat. 7A–30(2) to review the decision of the Court of Appeals reported in 26 N.C. App. 575, 217 S.E. 2d 9 (1975), which found no error, *Arnold J.*, dissenting, in the trial before *Webb, J.*, at the November 21, 1974 Session of NASH County Superior Court.

After the appeal was filed in this Court on July 31, 1975, defendant moved to amend the record on August 19, 1975, to note additional exceptions and assignments of error which would raise for review additional questions suggested by *Mullaney v. Wilbur*, 421 U.S. 684, decided on June 9, 1975. This motion was allowed on September 2, 1975, and the case argued on September 10, 1975.

19 Defendant was charged with the second degree murder of Gregory Ashe and entered a plea of not guilty. It was stipulated that had Dr. D. E. Scarborough, who performed the postmortem examination, been present at trial he would have testified that Gregory Ashe died on September 29, 1974, as a result of massive hemorrhage resulting from a gunshot wound to the heart.

Evidence for the State tended to show that on the night of September 29, 1974, Lorenzo Dancy, Wilbert Whitley, and the deceased, Gregory Ashe, left a dance hall and drove to a poolroom in Whitakers. Ashe was driving his car. Upon arrival at the poolroom, they discovered that it was closed. Ashe was unable then to restart his car. Ashe asked Dancy and Whitley for a match to light a cigarette. Neither had a match. Whitley announced that he was going to his home, one block away, and began walking. Dancy and Ashe were also walking away from the car when Ashe said that he was going back to "crank" the car. Dancy indicated that he was going on with Whitley. Dancy testified that he yelled for Whitley to wait and then proceeded to walk after Whitley. When last seen alive by Dancy, Ashe was seen walking alone back towards his car.

Moments later Dancy and Whitley each heard a gun fire. Dancy heard Ashe exclaim that he was shot and hollered this information to Whitley. A yellow and black Plymouth "Satellite" was observed pulling away at a fast rate of speed. It did not stop when it reached the nearby intersection of U.S. 301. Dancy and Whitley had differing accounts of whether the car left before or after Dancy hollered.

The shooting had occurred some time after 11:00 o'clock. Because of the darkness it was difficult to find Ashe. Around 12:00 o'clock, Ashe was discovered lying face down in a field about thirty feet from the road. A cigarette, which had been lit but which was now out, was in Ashe's hand. The body was removed at 4:00 or 5:00 o'clock that morning.

After determining the identity of the owner of the Plymouth, several law enforcement officers, including Deputy Sheriff M. M. Reams went to defendant's home, advised defendant of his rights, and questioned him. Defendant told Deputy Reams that he had been to Whitakers, had shot a person who had grabbed him and tried to cut his throat but did not know whether he had hit him. Reams testified that defendant's car was

20 searched with his consent and a knife was found in the middle of the front seat. Also found in the car was a ".30–06," ammunition for the ".30–06," and a hunting knife. Blood was observed on the driver's side of the car, just behind the door. Defendant gave Reams a shirt with a grease spot and stated that was where he had been grabbed. When asked about the pistol used in the shooting (*not* the ".30–06"), defendant told Reams that he was "in the process of buying" it but had already returned it to the seller, whom he refused to identify.

On cross-examination Reams gave this additional account of defendant's statements: Defendant was driving his Plymouth "Satellite" automobile near the poolroom when a man stopped him and asked him for a light. Defendant gave the man the cigarette lighter from the dash of his automobile. Defendant felt someone "shaking the car, shaking the right door that was locked." Defendant put the cigarette lighter back in the holder and when he turned around "the man" was reaching in with a knife at his throat and had a hand on defendant's chest. Defendant reached down, got a revolver, and "shot the man who already had his hand on his left chest."

Officer Reams also testified that after taking defendant's statement he returned to the morgue and examined the deceased's hands. He found no grease on them. Several witnesses for the State testified that they had never seen the deceased with a knife like the one in evidence found in defendant's car.

Defendant testified giving the following account of the incident: He was driving his Plymouth automobile slowly over a road containing large holes when someone asked for a light. Through his car mirror, defendant could see two men. One of them walked up to the car and defendant reached over to the dash of the car, pushed in the cigarette lighter, and gave the lighter to him. On returning the lighter to its holder, defendant felt the car move, and looked and noticed the second man standing on the right-hand side of the car. As he turned back to his left, the first man reached into his car, seized him by the left shoulder with his right hand and put a knife to defendant's throat with his left hand. Defendant felt the knife at his throat, grabbed his gun and shot. He surmised that his assailant dropped his knife in the car since it did not belong to
21 the defendant. Defendant admitted that he lied to the police about the whereabouts of the gun. He said:

"The pistol was in my house at the time the law came there. He did ask me for the pistol then. I told him I had returned it to the person I got it from. I had not returned it. It was in the house right then.

* * * * *

"The reason I didn't tell the Sheriff the truth about where the pistol was was because at that time I just wasn't thinking, but after I got up here in jail I decided I might as well go ahead and tell them. My wife had already given it to the officers at that time. It is true that I never told them where the pistol was. If they had wanted to search the house they could have found it right there under the mattress. I did not hide the gun. That was just to keep it away from the children."

Defendant's wife, however, testified that she got the pistol from defendant's drawer where "I am sure he put it."

In rebuttal the State introduced evidence that Gregory Ashe was right-handed.

The jury found defendant guilty of second degree murder. He was sentenced to not less than 20 nor more than 25 years imprisonment. The Court of Appeals found no error, Arnold, J., dissenting.

Rufus L. Edmisten, Attorney General, by Claude W. Harris, Assistant Attorney General, for the State.

L. G. Diedrick, W. O. Rosser and Roland Braswell, Attorneys for defendant appellant.

EXUM, Justice.

I

Defendant assigns as error the denial of his motions for judgment as of nonsuit. Judge Arnold's dissent was on the basis that nonsuit should have been allowed. Reviewing this assignment, we consider all of the evidence actually admitted, whether from the State or defendant, in the light most favorable to the State, resolve any contradictions and discrepancies therein in the State's favor, and give the State the benefit of all reasonable inferences from the evidence. *State v. Cutler*,
22 271 N.C. 379, 382, 156 S.E. 2d 679, 681 (1967). Defendant more specifically urges that this case comes within the rule that, "[w]hen the State introduces in evidence exculpatory statements of the defendant which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by these statements. While the intentional killing of another with a deadly weapon raises the presumption that the killing was unlawful and done with malice, this rule of law does not mean that the burden of showing an unlawful killing does not rest with the State. When the State's evidence and that of the defendant are to the same effect and tend only to exculpate the defendant, motion for nonsuit should be allowed. *State v. Carter*, 254 N.C. 475, 119 S.E. 2d 461." *State v. Johnson*, 261 N.C. 727, 730, 136 S.E. 2d 84, 86 (1964).

In *State v. Johnson, supra*, a murder prosecution, the State's only evidence that defendant committed a homicide was a confession that established a perfect self-defense. Circumstantial evidence corroborated the confession. Defendant's evidence at trial was to the same effect. In this context we held defendant entitled to a nonsuit and reversed a conviction for manslaughter. *State v. Carter, supra*, presented basically the same situation. There was no evidence which tended to contradict or impeach defendant's confession or testimony at trial that she acted lawfully in the defense of another.

[1] The State contends, however, and we agree that this case falls more squarely within the rule that the State is not bound by the exculpatory portions of a confession which it introduces, if there is "other evidence tending to throw a different light on the circumstances of the homicide." *State v. Bright*, 237 N.C. 475, 477, 75 S.E. 2d 407, 408 (1953); see also *State v. Bolin*, 281 N.C. 415, 189 S.E. 2d 235 (1972) and *State v. Cooper*, 273 N.C. 51, 159 S.E. 2d 305 (1968). In *State v. Bright, supra*,

the State introduced defendant's statement that he killed his wife accidentally while they were scuffling on the bed. We held, however, that evidence "such as the absence of powder burns, the location and direction of the fatal wound [and] the conduct of the defendant . . ." was sufficient to survive a motion for nonsuit, and we affirmed a manslaughter conviction. [2] We hold that nonsuit in this case was properly denied in view of evidence which casts doubt on defendant's version of the incident. This evidence is to the effect that: (1) defendant fled the scene at a great rate of speed; (2) defendant
23 originally lied about the gun and decided to tell the truth about it after his wife had turned it in to the police; (3) the deceased had no grease on his hands although defendant claimed the grease spot on his shirt was from being grabbed by the deceased; (4) the deceased was found with a cigarette in one hand, although defendant claims the deceased used two hands against him; (5) the deceased was right-handed although defendant claims that deceased wielded the knife with his left hand; (6) defendant says he was stopped by two persons while the State's evidence was that the deceased, when last seen alive moments before the shooting, was alone; (7) the deceased had never been seen with a knife in his possession similar to the one recovered from defendant's vehicle.

While none of these circumstances taken individually flatly contradicts defendant's statement, taken together they are sufficient to "throw a different light on the circumstances of the homicide" and to impeach the defendant's version of the incident. The State is not bound, therefore, by the exculpatory portions of the defendant's statement. The case is for the jury.

II

On cross-examination of the defendant by the district attorney the following occurred:

"Q. How many people have you ever shot before?

OBJECTION: OVERRULED: EXCEPTION

DEFENDANT'S EXCEPTION No. 3.

Q. Go ahead and tell us exactly how many?
A. I have shot one.
Q. Is that all?
A. Two.

Q. Is that all?
A. Yes."

As the cross-examination continued without further objection defendant admitted having been "convicted of whiskey" and "convicted one time of escaping from prison. . . I have not been convicted of anything else. I have been up once before in
North Carolina for assault; this is the second time. That
24 was for shooting. It was in self-defense. I came clear of that." On recross-examination the defendant testified: "I have not been previously convicted of assault. They kept me in jail three or four nights the time the man was hitting me with a stick. Years back a fellow whacked me with a knife and he was shot in the leg but I didn't go to jail for it. I just paid his hospital bill." Apparently with reference to this testimony the trial judge, summarizing the evidence, stated to the jury that the defendant "testified that he had once been convicted of escape and once he was convicted of assault, and you will recall the things he said he had been convicted for."

Defendant now assigns as error: first, the overruling of his objection to the district attorney's question, "How many people have you ever shot before?"; second, failure of the court to strike "defendant's testimony as to any prior arrests that did not result in a conviction"; and third, the statement of the trial judge hereinabove set out recapitulating the testimony of the defendant.

[3] With regard to the district attorney's question defendant properly concedes the right of the State to cross-examine defendant as to specific acts of misconduct, *State v. Gainey*, 280 N.C. 366, 185 S.E. 2d 874 (1972), and properly concedes that unlawfully shooting other people would be such misconduct. Defendant contends, however, that the question was patently asked in bad faith since the district attorney must have been aware that the defendant was acquitted of that charge. Defendant, however, testified that he had shot people on *two* other occasions only one of which resulted in an acquittal by reason of self-defense. There is no showing in the record that the district attorney in fact knew the official outcome of these assaults. Apparently one of them never came to trial.

[4] As to the trial judge's failure to strike defendant's testimony regarding prior arrests which did not result in convictions, suffice it to say there was no motion to strike any of this testimony. Apparently defendant was satisfied at trial with

his full explanation before the jury of the outcome of the two shooting incidents. The trial judge was not required, *sua sponte*, to strike this testimony. *State v. Battle*, 267 N.C. 513, 148 S.E. 2d 599 (1966).

[5] Although defendant admitted he paid hospital bills for one of his victims, he said also that he "didn't go to jail
25 for it" and that he had "not previously been convicted of assault." The trial judge did, it seems, inaccurately recapitulate the defendant's testimony on this point. The misstatement is understandable. Nevertheless "inaccurate statements of this character are not ground for a new trial unless called to the court's attention with request that correction be made before the case is submitted to the jury." *State v. Revis*, 253 N.C. 50, 53, 116 S.E. 2d 171, 174 (1960). In *State v. Cantrell*, 230 N.C. 46, 51 S.E. 2d 887 (1949) relied on by defendant on this point, defendant was tried on a charge of carnally knowing his ten year old child. In dictume this Court volunteered the observation that it would have been error for the trial judge to say, in recapitulating the evidence, that defendant "admitted . . . he had been tried and convicted of an assault with intent to commit rape on his daughter Dorline Shelton" unless such an admission appeared in the record. (It does not appear in the opinion but the record reveals that Dorline Shelton was not the prosecutrix, but another daughter of the defendant.) Noting that no exception was taken or assignment of error directed to this portion of the charge, this Court recognized that the defendant may indeed have made such an admission although none appeared in the record. Assuming the correctness of this dictum, the supposed misstatement there considered is clearly distinguishable from the one here. In prosecutions for various kinds of illicit sexual activity, our decisions have been characterized as being "markedly liberal in holding evidence of similar sex offenses admissible" on the question of guilt. 1 Stansbury's North Carolina Evidence 299 (Brandis Rev. 1973). It might then be considered that the assumed misstatement in *Cantrell* was one of a fact bearing directly on defendant's guilt. This Court has said that "a statement of a material fact not shown in the evidence constitutes reversible error" whether or not called to the trial court's attention. *State v. McCoy*, 236 N.C. 121, 124, 71 S.E. 2d 921, 923 (1952). The misstatement here complained of was clearly upon a collateral matter.

These assignments of error are, consequently, overruled.

III

[6] In his final mandate the trial judge failed to reiterate and specify that self-defense was a possible theory of acquittal. Defendant contends that under *State v. Dooley*, 285 N.C. 158, 203 S.E. 2d 815 (1974) this is reversible error. After the jury had been deliberating approximately forty-five minutes,
26 however, they returned to the courtroom to ask for clarification on the distinction between manslaughter and murder in the second degree. In the course of his instructions responsive to this inquiry the trial judge charged in addition as follows:

> "Also, I want to instruct you that the charge I gave you as to self-defense would apply equally to manslaughter as it would to second degree murder in that if you find the defendant was justified or excused in the killing because he was acting in self-defense then you would find him not guilty as to either one."

While *Dooley* does require the trial judge to include in his final mandate the theory of acquittal by reason of self-defense where it has been raised by the evidence, failure here to do so was cured, in our opinion, by the additional instructions. *State v. Brooks*, 225 N.C. 662, 36 S.E. 2d 238 (1945). Certainly the additional instructions render any error of omission in the final mandate harmless beyond a reasonable doubt.

IV

On June 9, 1975, the United States Supreme Court decided *Mullaney v. Wilbur*, 421 U.S. 684, which held that a Maine jury instruction requiring a defendant being tried for murder to prove by a preponderance of the evidence, in order to reduce the murder to manslaughter, that he acted in the heat of passion on sudden provocation, violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution, as that clause was interpreted in *In re Winship*, 397 U.S. 358 (1970) to require the prosecution to prove beyond a reasonable doubt every fact necessary to constitute a crime. It was subsequently re-explained in *Faretta v. California*, ... U.S. ...., 95 S.Ct. 2525, n. 15 (June 30, 1975) that the right of the defendant to have this burden placed on the State, though not literally expressed in any particular provision of the Consti-

tution, was essential to due process of law in a fair adversary process.

Defendant contends that under the rationale of *Mullaney* the trial judge's instructions to the jury in this case violate Fourteenth Amendment Due Process. While the trial judge in defining second degree murder and manslaughter and in his final mandate to the jury placed upon the State the burden to prove beyond a reasonable doubt both malice and
27 unlawfulness, i.e, without justification or excuse, he also instructed the jury, in pertinent part, as follows:

> *"If the State proves beyond a reasonable doubt or it is admitted that the defendant intentionally killed Gregory Ashe with a deadly weapon, or intentionally inflicted a wound upon Gregory Ashe with a deadly weapon, that proximately caused his death, the law raises two presumptions; first, that the killing was unlawful, and second, that it was done with malice. Then, nothing else appearing, the defendant would be guilty of second degree murder. . . .*
>
> "As I told you, you will have to either find the defendant guilty of second degree murder or manslaughter or not guilty. *In order to reduce the crime from second degree murder to manslaughter, the defendant must prove not beyond a reasonable doubt but simply to your satisfaction that there was no malice on his part. And in order to excuse his act altogether on the grounds of self-defense, the defendant must prove not beyond a reasonable doubt but simply to your satisfaction that he acted in self-defense.* And I will charge you on self-defense in just a moment. But I do want to charge you that to *negate malice and thereby reduce the crime to manslaughter, the defendant must satisfy you of three things:* first, that he shot Gregory Ashe in the heat of a passion. . . . The second thing he must satisfy you of is that this passion was provoked by acts of Gregory Ashe which the law regards as adequate provocacation. . . . And thirdly, that the shooting took place so soon after the provocation that the passion of a person of average mind and disposition would not have cooled.

> *"To excuse the killing entirely on the grounds of self-defense . . . the defendant must satisfy you of four things:* first, that it appeared to the defendant and he believed it to be necessary to shoot Gregory Ashe in order to save himself from death or great bodily harm. . . . The second thing that you must be satisfied of—excuse me—that the defendant must satisfy you of this, that the circumstances as they appeared to him at the time were sufficient to create such belief in the mind of a person of ordinary firmness. . . . And the third thing the defendant must satisfy you of is that he was not the aggressor. . . . And the fourth thing that the defendant must satisfy you of is that he did not use excessive force. . . .
>
> 28 "If you find that the defendant acted properly in self-defense, he would not be guilty. However, if the defendant though otherwise acting in self-defense used excessive force, the defendant would be guilty of voluntary manslaughter." (Emphasis supplied.)

[7] We hold that by reason of the decision in *Mullaney* the Due Process Clause of the Fourteenth Amendment prohibits the use of our long-standing rules in homicide cases that a defendant in order to rebut the presumption of malice must prove to the satisfaction of the jury that he killed in the heat of a sudden passion and to rebut the presumption of unlawfulness, that he killed in self-defense. The instructions given here insofar as they placed these burdens of proof on the defendant violate the concept of due process announced for the first time in *Mullaney*. We decline, however, for reasons hereinafter stated, to give *Mullaney* retroactive effect in North Carolina. We hold that because the trial judge instructed the jury in accordance with our law of homicide as it stood, and in a trial conducted, before the *Mullaney* decision, the defendant is not entitled to the benefit of the *Mullaney* doctrine. We will, however, apply the decision to all trials conducted on or after June 9, 1975.

The law of Maine and the precise issue it presented was succintly stated by the Supreme Court in *Mullaney:*

> *"Absent justification or excuse, all intentional or criminally reckless killings are felonious homicides. Felonious homicide is punished as murder—i.e., by life imprisonment—unless the defendant proves by a fair preponder-*

ance of the evidence that it was committed in the heat of passion on sudden provocation, in which case it is punished as manslaughter—i.e., by a fine not to exceed $1,000 or by imprisonment not to exceed 20 years. The issue is whether the Maine rule requiring the defendant to prove that he acted in the heat of passion on sudden provocation accords with due process." 421 U.S. at 691–92. (Emphasis supplied.)

A portion of the trial judge's instructions to the jury in Maine were summarized in *Mullaney* as follows:

"[*T*]*hat if the prosecution established that the homicide was both intentional and unlawful, malice aforethought was to be conclusively implied unless the defendant proved by a fair preponderance of the*
29 *evidence that he acted in the heat of passion on sudden provocation.* The court emphasized that *'malice aforethought and heat of passion on sudden provocation are inconsistent things.'* [Appendix to the Record] at 62; thus, by proving the latter the defendant would negate the former and reduce the homocide from murder to manslaughter. The court then concluded its charge with elaborate definitions of 'heat of passion' and 'sudden provocation.'" *Id.* at 686–87. (Emphasis supplied.)

Maine's conclusive implication of malice which arose from proof of an unlawful and intentional killing meant simply that upon proof of these things the defendant was guilty of murder unless the defendant proved by a fair preponderance of the evidence that he acted in heat of passion on sudden provocation where the issue of heat of passion was raised. Thus Maine's law under these circumstances relieved the State of the burden of proving both malice and the absence of heat of passion. In this the Supreme Court found that due process was wanting. It said:

"Maine law requires a defendant to establish by a preponderance of the evidence that he acted in the heat of passion on sudden provocation in order to reduce murder to manslaughter. Under this burden of proof a defendant can be given a life sentence when the evidence indicates that it is *as likely as not* that he deserves a significantly lesser sentence. This is an intolerable result in a society

where, to paraphrase Mr. Justice Harlan, it is far worse to sentence one guilty only of manslaughter as a murderer than to sentence a murderer for the lesser crime of manslaughter. *In re Winship,* 397 U.S. at 372 (concurring opinion). We therefore hold that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." *Id.* at 703–704.

In North Carolina, our law of homicide pertinent to the questions here raised has not been substantially changed since it was enunciated in 1864 in *State v. Ellick,* 60 N.C. 450. This Court there said:

"When it is proved that one has killed intentionally, with a deadly weapon, the burthen of showing justification, excuse or mitigation, is upon him. *Id.* at 459.

* * * * *

30 ". . . the fact of the homicide must be proved *by the State;* but if found or admitted, the *onus* of showing justification, excuse or mitigation, is upon the *prisoner.*" *Id.* at 462.

The Court in *Ellick* concluded its opinion by saying that any fact which the State is required to establish must be proved beyond a reasonable doubt; but as to facts which the prisoner is required to establish, the jury must be satisfied by the testimony that they are true. *Ellick* has been cited as authoritative in *State v. Phillips,* 264 N.C. 508, 515, 142 S.E. 2d 337, 341 (1965) and *State v. Creech,* 229 N.C. 662, 673, 51 S.E. 2d 348, 357 (1949).

Another of our early cases on the subject was *State v. Willis,* 63 N.C. 26 (1868), which while holding that the defendant need not prove mitigation or justification by a preponderance of the evidence, nevertheless approved the following instruction given by the trial judge:

"[W]hen it is proved or admitted that one killed another intentionally, with a deadly weapon, the burden of showing justification, excuse or mitigation is on him, and all the circumstances of such justification, excuse or mitigation are to be satisfactorily proved by him, unless they appear in the evidence against him; that the fact of killing being proved or admitted, nothing more

appearing, the law presumes such killing to have been done in malice, and so to be murder; that the circumstances of justification, excuse or mitigation, are to be *satisfactorily* proved, not proved as the State is required to prove an essential fact, that is beyond a reasonable doubt, for the doctrine of reasonable doubt is never applied to the condemnation of a prisoner, but to his acquittal; and that the jury must be satisfied by the testimony offered in the case on either side that the matter in justification, excuse or mitigation is true." *Id.* at 26–67. (Emphasis supplied.)

The Court said further:

"We prefer to stand *super antiquas vias*, and to adhere to the rules laid down in the *State v. Ellick*, above referred to. In that case the erroneous statement which we had inadvertently made in the *State v. Peter Johnson*, [48 N.C. 266 (1855)] that it was incumbent on the prisoner to establish the matters of excuse or extenuation
31 beyond a reasonable doubt, is corrected. In it is also corrected wht we consider as erroneous in the decision of the Court in *Commonwealth v. York* [9 Met. (50 Mass.) 93 (1845)], that the matters of excuse or extenuation which the prisoner is to prove, must be decided according to the preponderance of evidence. It is more correct to say, as we think, that they must be proved to the satisfaction of the jury." *Id.* at 29.

In *State v. Vann*, 82 N.C. 631, 635 (1880), Justice Dillard, elucidating the law laid down in *Ellick* and *Willis*, wrote:

"In an indictment for murder, the two constituents of the crime, to-wit, a voluntary killing and malice aforethought, must be proved by the state, as it makes the charge; and as the accused is presumed to be innocent until the contrary is shown, both of these elements must be proved. The killing being shown, then the other ingredient, malice prepense, is also proved as a fact in the eyes of the law, not by evidence adduced, but by a presumption that the law makes from the fact of the killing. And these two essential facts being thus established, the legal conclusion thereon is, that the offense charged is murder. (Citations omitted.)

"But the implication of malice, made by the law and taken as a fact, is not conclusive on the party accused, but may be rebutted. He may show, if he can, by his proofs, that there was no malice prepense and thereby extenuate to manslaughter, or make a case of justifiable or excusable homicide, or a case of no criminality at all by proof of insanity at the time of the act committed, disabling him to know right from wrong. (Citations omitted.) *The burden lies on the accused to make these proofs, if he can; otherwise, the conclusion of murder, on a malice implied, will continue against him and will call for, and in law, oblige a conviction by the jury.*" (Emphasis supplied.)

In *State v. Miller*, 112 N.C. 878, 885, 17 S.E. 167, 169 (1893), the Court pointed out "that when the killing with a deadly weapon is proved and admitted the burden is shifted upon the prisoner, and he must satisfy the jury, if he can do so from the whole of the testimony, as well that offered for the State as for the defense, that matter relied on to show mitigation or excuse is true."

32 These early cases were decided before the enactment of N.C. Pub. Laws 1893, ch. 85 (now N. C. Gen. Stat. 14–17), which divided murder in two degrees. This act made certain specified kinds of murder, including a deliberate and premeditated killing, murder in the first degree. All other kinds of murder were made by the statute murder in the second degree. *State v. Benton*, 276 N.C. 641, 657, 174 S.E. 2d 793 (1970). Homicide cases decided subsequent to this statute continued to sanction the presumptions of unlawfulness and malice but refused to recognize any presumption of premeditation or deliberation. *State v. Brown*, 249 N.C. 271, 106 S.E. 2d 232 (1958); *State v. Absher*, 226 N.C. 656, 40 S.E. 2d 26 (1946); *State v. Keaton*, 206 N.C. 682, 175 S.E. 296 (1934); *State v. Rhyne*, 124 N.C. 847, 33 S.E. 128 (1899); *State v. Fuller*, 114 N.C. 885, 19 S.E. 797 (1894). Modern, accurate and sufficient statements of the rules regarding these presumptions may be found in *State v. DuBoise*, 279 N.C. 73, 181 S.E. 2d 393 (1971); *State v. Winford*, 279 N.C. 58, 181 S.E. 2d 423 (1971).

The foregoing authorities establish that from 1864 to 1975, 111 years, the law of this State has been this: when it established by a defendant's judicial admission, or the State proves beyond a reasonable doubt that the defendant intentionally in-

flicted a wound upon the deceased with a deadly weapon which proximately caused death, the law raises two presumptions against the defendant: (1) the killing was unlawful, and (2) it was done with malice. Nothing else appearing in the case the defendant would be guilty of murder in the second degree. When these presumptions arise the burden devolves upon the defendant to prove to the satisfaction of the jury the legal provocation which will rob the crime of malice and reduce it to manslaughter or which will excuse the killing altogether on the ground of self-defense. If defendant rebuts the presumption of malice only, the presumption that the killing was unlawful remains, making the crime manslaughter. The jury instructions complained of here were in accordance with these long established rules.

This Court has never defined precisely what is meant by "satisfying" the jury. It has been clear, however, from the earliest cases that satisfying the jury meant something other than persuading beyond a reasonable doubt and persuading by a preponderance of the evidence. *State v. Freeman*, 275
33 N.C. 662, 170 S.E. 2d 461 (1969); *State v. Barrett*, 132 N.C. 1005, 43 S.E. 832 (1903). This Court said in *Barrett*:

> "[T]he prisoner must satisfy the jury, neither by a reasonable doubt nor yet by a preponderance of the evidence, but simply satisfy them, of the existence of facts and circumstances which mitigate the offense or which make good a plea of self-defense."

Satisfying the jury, the standard long adopted by this Court and utilized in the instructions now under consideration means, we believe, a standard no greater and at the same time one not significantly less than persuasion by a preponderance of the evidence. Satisfying the jury means that there must be some evidence offered of all elements of heat of passion on sudden provocation or of self-defense, as the case may be, and that this evidence must satisfy or persuade the jury of the truth of the existence of these provocations—one which robs the crime of malice and the other which excuses it altogether.

Under the Maine rules considered in *Mullaney* when the State proved beyond a reasonable doubt that the killing was (1) intentional, and (2) unlawful, the jury was told that the defendant would be guilty of murder unless he proved by a preponderance of the evidence that he killed in the heat of

passion in which case he could be convicted only of manslaughter. Under North Carolina rules when the State proved beyond a reasonable doubt a killing proximately resulting from the intentional use of a deadly weapon the jury here was told, in effect, that defendant would be guilty of murder in the second degree unless he "satisfies" the jury that he killed in the heat of sudden passion or in self-defense. The instructions here under consideration, therefore, like those in Maine, unconstitutionally relieved the prosecution of the burden of proving beyond a reasonable doubt malice and unlawfulness when the issues of their existence were properly raised.

We note that there is no evidence in this case of a killing in the heat of passion on sudden provocation. Therefore this issue is not "properly presented" as it was in *Mullaney*. There could not, consequently, be any *Mullaney* error prejudicial to defendant on this aspect of the case.

As a matter of state law, however, and as the jury was instructed here, our rules allocating burden of proof on self-defense and heat of passion are the same. As early as
34 1868 this Court in *State v. Willis, supra* at 29–30 said,

> "In the proof of such matters we do not recognize any distinction between the case where the question is whether the homicide is murder or manslaughter, and that where it is whether the killing is murder or excusable or justifiable homicide." There is in this case evidence of self-defense. The issue regarding its existence is properly presented. For the guidance of our trial judges, consequently, and inasmuch as there are jury instructions given here as if there were evidence of a heat of passion killing, we have discussed the matter as if such evidence were indeed present.

It is also true that the trial judge did near the beginning and at the end of his instructions tell the jury that the State had the burden to prove beyond a reasonable doubt both malice and unlawfulness. We are cognizant of the federal rule that jury instructions must be considered contextually in determining whether there is error of federal constitutional dimension. *Cupp v. Naughten*, 414 U.S. 141 (1973). Considering the entire instruction contextually we believe it must have meant this to the jury in this case: the state as a matter of abstract principle was required to prove each element of the offense charged, including malice and unlawfulness, beyond a reasonable doubt. If, however, an intentional killing with a deadly weapon was so

proved (defendant here admitted this much) a presumption arises which given in the presence of evidence of a justifiable, and hence, lawful, homicide nevertheless relieves the state of proving unlawfulness and requires the jury to find the defendant guilty unless this evidence satisfies it of the truth of defendant's contention that he did kill in self-defense.

[8] The *Mullaney* ruling does not, however, preclude all use of our traditional presumptions of malice and unlawfulness. It precludes only utilizing them in such a way as to relieve the state of the burden of proof on these elements when the issue of their existence is raised by the evidence. The presumptions themselves, standing alone, are valid and, we believe, constitutional. *State v. Williams* . . . N.C. . . ., . . . S.E. 2d . . . (1975); *State v. Sparks*, 285 N.C. 631, 207 S.E. 2d 712 (1974), pet. for cert. filed, 43 U.S.L.W. 3392 (U.S. Nov. 29, 1974) (No. 669). Neither, by reason of *Mullaney*, it is unconstitutional to make the presumptions mandatory in the absence of contrary evidence nor to permit the logical inferences arising from facts proved (killing by intentional use of deadly weapon), *State v. Williams, supra*, to remain and be weighed against con-

35 trary evidence if it is produced. The effect of making the presumptions mandatory in the absence of any contrary evidence is simply to impose upon the defendant a burden to go forward with or produce some evidence of all elements of self-defense or heat of passion on sudden provocation, or rely on such evidence as may be present in the State's case. The mandatory presumption is simply a way of stating our legal rule that in the absence of evidence of mitigating or justifying factors all killings accomplished through the intentional use of a deadly weapon are deemed to be malicious and unlawful. The prosecution need not prove malice and unlawfulness unless there is evidence in the case of their nonexistence. *Cf.* McCormick, Evidence (2d Ed. 1972) § 346, n. 91. We find this perceptive language in G. Fletcher, "Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion-Practices in Criminal Cases," 77 Yale L.J. 905 (1968) (cited in *Mullaney v. Wilbur, supra*, n. 16):

> "The critical step in the conceptual evolution of malice is *MacKally's Case*. [9 Co. Rep. 65b, 77 Eng. Rep. 828 (1611)]. That early 17th century decision, as reported and interpreted by Coke, stands for the principle that the prosecution need not prove the element of malice to convict of murder. The judges realized that malice does not lend itself to affirmative proof; by and large, the malicious killing is defined by reference to what it is not, not by what it it. As agreed by all, one type that was not malicious was a killing provoked by a sudden quarrel. Thus, to have a triable issue of malice, one had to have a triable claim that the defendant killed in the course of a sudden quarrel."

The same, we believe, may be said of the element of unlawfulness. There is no suggestion in *Mullaney* that placing such a burden of producing evidence upon a defendant violates Fourteenth Amendment Due Process. "Many States do require the defendant to show that there is 'some evidence' indicating that he acted in the heat of passion before requiring the prosecution to negate this element by providing the absence of passion beyond a reasonable doubt. (Citations omitted.) Nothing in this opinion is intended to affect that requirement." *Mullaney v. Wilbur, supra*, n. 28.

If there is evidence tending to show all elements of heat of passion on sudden provocation or self-defense the mandatory presumption of malice and unlawfulness, respectively, disappear but the logical inferences remaining from the facts

36 proved may be weighed against this evidence. In *United States v. Barnes*, 412 U.S. 837 (1973), the Supreme Court said:

> "Of course, the mere fact that there is some evidence tending to explain a defendant's possession consistent with innocence does not bar instructing the jury on the inference. The jury must weigh the explanation to determine whether it is 'satisfactory'. . . . The jury is not bound to accept or believe any particular explanation any more than it is bound to accept the correctness of the inference. But the burden of proving beyond a reasonable doubt that the defendant did have knowledge that the property was stolen, an essential element of the crime, remains on the government."

See United States v. Dube, 520 F.2d 250 (1st Cir. 1975) (Judge Campbell concurring.)

Mullaney, then, as we have interpreted it, requires our trial judges in homicide cases to follow these principles in their jury instructions: the State must bear the burden throughout the trial of proving each element of the crime charged includ-

ing, where applicable, malice and unlawfulness beyond a reasonable doubt. The decision permits the state to rely on mandatory presumptions of malice and unlawfulness upon proof beyond a reasonable doubt that the defendant intentionally inflicted a wound upon the deceased with a deadly weapon which proximately resulted in death. If, after the mandatory presumptions are raised, there is no evidence of a heat of passion killing on sudden provocation and no evidence that the killing was in self-defense, *Mullaney* permits and our law requires the jury to be instructed that defendant must be convicted of murder in the second degree. If, on the other hand, there is evidence in the case of all the elements of heat of passion on sudden provocation the mandatory presumption of malice disappears but the logical inferences from the facts proved remain in the case to be weighed against this evidence. If upon considering all the evidence, including the inferences and the evidence of heat of passion, the jury is left with a reasonable doubt as to the existence of malice it must find the defendant not guilty of murder in the second degree and should then consider whether he is guilty of manslaughter. If there is evidence in the case of all the elements of self-defense, the mandatory presumption of unlawfulness disappears but the logical inferences from the facts proved may be weighed against this evidence. If upon considering all the evidence, including the inferences and evidence of self-defense, the jury is left with a reasonable doubt as to the existence of unlawfulness it must find the defendant not guilty.

37 This case was tried November 21, 1974; *Mullaney* was decided June 9, 1975. We decline, without further guidance from the Supreme Court, to give the decision retroactive effect. We believe and hope that the Supreme Court will eventually determine that the decision applies prospectively only. If such a determination is eventually made by the Supreme Court not only would we not be required to apply its principles to the case now before us, *Kaiser v. New York*, 394 U.S. 280 (1969); *Desist v. United States*, 394 U.S. 244 (1969), it seems that it would be considered error by the Supreme Court for us to do so. In *Michigan v. Payne*, 412 U.S. 47 (1973), the Michigan Supreme Court had rejected a higher sentence imposed upon a defendant convicted after a retrial than was imposed upon his first conviction as being violative of certain due process requirements established in *North Carolina v.*

Pearce, 395 U.S. 711 (1969). The second sentence was imposed before the *Pearce* decision. In *Payne* the United States Supreme Court held that *Pearce* would not apply retroactively and it was, consequently, error for the Michigan Supreme Court to apply it to a sentencing proceeding which predated the decision although the question of the constitutionality of the higher sentence was pending before the Michigan Supreme Court when *Pearce* was decided. The judgment of the Michigan Supreme Court was reversed and the case remanded for further proceedings. *See also State v. Bullock*, 268 N.C. 560, 151 S.E. 2d 9 (1966) and *State v. Mills*, 268 N.C. 142, 150 S.E. 2d 13 (1966) where we declined to apply *Miranda v. Arizona*, 384 U.S. 436 (1966) to cases in which the trials were conducted before the decision but which were pending on appeal at the time the decision came down, on the authority of *Johnson v. New Jersey*, 384 U.S. 719 (1966).

While *Mullaney* relied heavily on *Winship* and *Winship* was held to be retroactive in *Ivan V. v. City of New York*, 407 U.S. 203 (1972), it does not necessarily follow that *Mullaney* will be given retroactive effect.

In determining whether a new rule of constitutional proportions is given retroactive effect the Supreme Court

38 seems to have considered three factors. The most important factor seems to have been the purpose to be served by the new rule. If the rule is designed to protect the reliability of the fact finding process and "the constitutional error presents a serious risk that the issue of guilt or innocence may not have been reliably determined" then it has been said that the decision will on this basis alone be given full retroactive effect. *Ivan V. v. City of New York, supra* (holding *In re Winship, supra*, retroactive); *Roberts v. Russell*, 392 U.S. 293 (1968) (holding *Bruton v. United States*, 391 U.S. 123 (1968) retroactive).

If the first factor is not determinative then the Supreme Court has considered two other factors: the extent of reliance on previous decisions, *Tehan v. United States ex rel Shott*, 382 U.S. 406 (1966), even though the new rule may have been "foreshadowed" by intervening cases, *Desist v. United States, supra* at 248, and the effect on the administration of justice of retroactive application, *Id.* at 251, not only in the nation but as a whole but within the particular jurisdictions affected. *Tehan v. United States ex rel. Shott, supra* at 418–419.

Although the first factor listed is clearly the most important, how that factor is approached by the Supreme Court seems sometimes to depend on analysis of the other two factors. *Compare Tehan v. United States ex rel. Shott, supra* (holding *Griffin v. California*, 380 U.S. 609 (1965) not retroactive), *with Stovall v. Denno*, 388 U.S. 293 (1967) (holding *United States v. Wade*, 388 U.S. 218 (1967) and *Gilbert v. California*, 388 U.S. 263 (1967) not retroactive) In holding *Griffin*, which declared unconstitutional the California practice of commenting on a defendant's failure to take the stand, not to be retroactive the Supreme Court in *Tehan* recognized that, although only six states would be affected by *Griffin*, almost every trial in those six states going back many years might have to be upset if *Griffin* were made retroactive. Noting such a devastating impact on the administration of justice, the Supreme Court said:

> "Those reaping the greatest benefit from a rule compelling retroactive application of *Griffin* would be [those] under lengthy sentences imposed many years before *Griffin*. Their cases would offer the least likelihood of a successful retrial since in many, if not most, instances, witnesses and evidence are no longer available." *Tehan v. United States ex rel. Shott, supra* at 418–419.

39 *Mullaney* and *Winship* are poles apart in terms of extent of reliance on previous rules and the effect on the administration of justice of retroactive application. It seems clear that the Supreme Court saw no reliance by New York on previous rules in *Winship*. It traced almost 100 years of cases in which it had "assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required." *In re Winship*, *supra* at 362. It considered *In re Gault*, 387 U.S. 1 (1967) as an express rejection of the notion that the Due Process Clause was inapplicable to juvenile proceedings. *In re Winship, supra* at 365. *Winship*, furthermore, involved a juvenile proceeding. Its impact, consequently, on the administration of justice in New York would obviously be less than a rule which applies to all homicide cases.

The jury instructions here under attack are based upon rules which have been firmly with us for over one hundred years. Retroactive application of *Mullaney* in this State would, furthermore, have the same sort of affect, recognized in *Tehan*, as *Griffin* retroactively would have had in California and other jurisdictions. As of June 30, 1975, there were 269 inmates in

prison in this State who had been convicted of first degree murder serving sentences of life imprisonment or awaiting execution, and 728 inmates in prison having been convicted of second degree murder serving sentences ranging from two years to life. State Correctional Statistical Abstract for the Second Quarter, 1975. If *Mullaney* is to be applied retroactively new trials might have to be awarded in many cases decades old.

A number of other jurisdictions would, we believe, be similarly affected. In the following seven jurisdictions the defendant has (or had) the burden to prove by a preponderance of the evidence heat of passion on sudden provocation (or "extreme emotional distress") to reduce murder to manslaughter: *Delaware, Fuentes v. State*, 18 Crim. Law Rptr. 2153 (Del. Oct. 14, 1975); *Hawaii*, (*Mullaney* would probably affect cases in which the appeal was finally determined prior to August 27, 1971. *Compare State v. Santiago*, 53 Haw. 254, 492 P. 2d 657 (1971) *with State v. Cuevas*, 53 Haw. 110, 488 P. 2d 322 (1971)); *Maine, Mullaney v. Wilbur, supra; Maryland, Wilson v. State*, 261 Md. 551, 276 A. 2d 214 (1971); *Wilson v. State*, ... Md. App. ....., 343 A. 2d 537 (1975); *Burko v. State*, 19 Md. App. 645, 313 A 2d 864 (1974) vacated .... US. ....., 95 S.Ct. 2624 (1975); *Massachusetts, Comm. v Johnson* .... Mass. App. ....., 326 N.E. 2d 355 (1975) restating the

40 rule of *Comm. v. York*, 50 Mass (9 Met.) 93 (1845); *Cf. Comm. v. Gagne*, ... Mass. ....., 326 N.E. 2d 907, 910 (1975); *New York, People v. Balogun*, ... N.Y. 2d ....., ... N.E. 2d ....., 372 N.Y.S. 2d 384 (N. Y. Supreme Ct. Kings County 1975); *Tennessee, Hawkins v. State*, 527 S.W. 2d 157 (Tenn. App. 1975). If, as we believe, *Mullaney* prohibits requiring the defendant to prove that he acted in self-defense by a preponderance of the evidence when that issue is properly presented the following seven jurisdictions would be adversely affected: *Georgia, Chandle v. State*, 230 Ga. 574, 198 S.E. 2d 289 (1973); *See also Henderson v. State*, ... *Ga.* ....., 218 S.E. 2d 612 (1975) (citing *Mullaney*); *Ohio, State v. Poole*, 33 Ohio St. 2d 18, 294 N.E. 2d 888 (1973) (for cases prior to January 1, 1974, the effective date of Ohio Rev. Code Ann. § 2901.05 (Page 1975) which probably corrects Ohio law); *Pennsylvania, Comm. v. Cropper*, ... Pa. ....., 345 A. 2d 645 (1975) (intimating that *Mullaney* may affect Pennsylvania); *Comm. v. Carbonetto*, 455 Pa. 93, 314 A. 2d 304 (1974); *Comm. v. Winebrenner*, 439 Pa. 73, 265 A. 2d 108 (1970); *Rhode Island, State*

v. Mellow, 107 A. 871 (1919); *South Carolina, State v. Judge*, 208 S.C. 497, 38 S.E. 2d 715 (1946); *Texas, Parkman v. State*, 149 Tex. Cr. 101, 191 S.W. 2d 743 (1945) (at least in cases tried before January 1, 1974, the effective date of the new Texas Penal Code §§ 2.03, 9.02, 9.31 (Vernon 1974), which probably corrects Texas law in this respect); *West Virginia, State v. Collins*, 154 W. Va. 771, 180 S.E. 2d 54 (1971).

Retroactive application of *Mullaney* requiring retrials in homicide cases years old in at least fifteen jurisdictions would, we believe, have on the administration of justice in this country a devastating impact.

We concede that the purpose of the *Mullaney* rule, to insure a reliable determination of the question of guilt, or the degree of guilt, weighs in favor of retroactivity. Yet the Supreme Court has recognized that "the extent to which a condemned practice infects the integrity of the truth-determining process at trial is a question of probabilities." *Williams v. United States*, 401 U.S. 646, n. 7 (1971); *Stovall v. Denno, supra*. While in *Winship* there could be no question that the standard of proof employed was determinative on the issue of guilt. *In re Winship, supra*, n. 2, whether the jury instructions condemned in *Mullaney* and even more clearly those under attack here would in the final analysis be so determinative to a jury so instructed is a matter of pure speculation.

41 We note that both cases from other jurisdictions which have so far considered the question, have determined that *Mullaney* should not be given retroactive effect. *Fuentes v. State, supra* (Delaware); *People v. Balogun, supra* (New York).

For the reasons given, in the trial we find

No error.

Justice LAKE concurring in result.

It is elementary that a decision of the Supreme Court of the United States interpreting the Constitution of the United States is binding upon this Court and, although we may believe it to be erroneous, we must give it full effect in cases coming before us. It is equally elementary that a decision of a court of last resort, declaring or interpreting a rule of law, is retroactive and applies to all cases thereafter to be decided, irrespective of when they arose, unless the court which rendered that decision declares otherwise. This is more clearly true when there has been no prior conflicting decision by that court. This Court

does not have authority to declare a decision of the Supreme Court of the United States non-retroactive. In the silence of that Court on that question a decision by it, interpreting the Due Process Clause of the Fourteenth Amendment, gives to that clause the meaning so declared just as if the interpretation had been expressly written into it at the time the Amendment was ratified.

To hold, as the majority opinion does, that *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. , 44 L.Ed. 2d 508, declares that the instruction given the jury in the case now before us, violates the Due Process Clause of the Fourteenth Amendment, but that we will, nevertheless, refuse to order a new trial is for this Court to deny to this defendant his right under the United States Constitution. I agree that to give *Mullaney v. Wilbur, supra*, retroactive effect and to hold that it declares the instruction in question is contrary to the Due Process Clause of the Fourteenth Amendment would be disastrous, for such ruling would require a new trial, not only for this defendant, but for an unknown number, perhaps hundreds, of prisoners now serving sentences for murders of which this Court has held they were lawfully convicted. The practical effect would be to release most of these convicted murders upon society since loss of witnesses, due to the passage of time, would, in most in-

42 stances, prevent conviction upon a retrial. This disaster can be averted if the Supreme Court of the United States declares *Mullaney v. Wilbur, supra*, to be non-retroactive, a consummation devoutly to be desired, but this Court has no authority so to declare and, as of this date, the Supreme Court of the United States has not done so.

There is a way, however, whereby this Court can avoid this disastrous result and, in my opinion, should do so. That is to hold, as I believe is correct, that *Mullaney v. Wilbur, supra*, does not declare the instruction given to the jury by the Superior Court in Hankerson's case a violation of the Due Process Clause. If that be true, Hankerson is not entitled to a new trial and the majority opinion has reached the correct result for the wrong reason.

This is the instruction in question:

> "Under our system, when a person is charged with a crime and he pleads not guilty he does not have to prove that he is innocent, he is presumed innocent, and the *burden of proof is on the State to prove beyond a rea-*

sonable doubt that he is guilty before you can find him guilty.

* * *

"I charge that for you to find the defendant guilty of second degree murder [the crime with which Hankerson was charged and of which he stands convicted], *the State must prove two things beyond a reasonable doubt* * * * that the defendant intentionally *and without justification* or excuse and *with malice* shot Gregory Ashe with a deadly weapon. *Malice* * * * *means that condition of mind which prompts a person* to take the life of another intentionally, *or to intentionally inflict a wound with a deadly weapon upon another which proximately results in his death without just cause, excuse or justification.*

* * *

"In order to reduce the crime from second degree murder to manslaughter, *the defendant must prove* not beyond a reasonable doubt but *simply to your satisfaction* that there was no malice on his part. And in order to excuse his act altogether on the grounds of self defense, *the defendant must prove* not beyond a reasonable doubt but *simply to your satisfaction* that he acted in self defense.

43 * * * * *

"So I charge you, Ladies and Gentlemen, *if you find* from the evidence and *beyond a reasonable doubt* that on or about September 29, 1974, *the defendant*, Johnnie B. Hankerson, *intentionally and with malice* and *without justification or excuse* [i.e., not in self defense] shot Gregory Ashe with a deadly weapon, thereby proximately causing George Ashe's death, nothing else appearing, it would be your duty to return a verdict of guilty of second degree murder. *However, if you* do not so find, or *have a reasonable doubt as to one or more of these things*, you will not return a verdict of guilt of second degree murder." (Emphasis added.)

By this instruction the trial judge put squarely upon the State the burden to prove *beyond a reasonable doubt* every element of second degree murder, namely: (1) The defendant shot Ashe; (2) he thereby proximately caused Ashe's death; (3) he

shot Ashe with malice (i.e., intentionally and with a deadly weapon); (4) he shot Ashe without justification or excuse (i.e., not in self defense).

Clearly, if this were all that the jury was told, the rule of *Mullaney v. Wilbur, supra,* would be fully satisfied. But, says the majority, this is not all they were told. They were also told that to reduce the offense to manslaughter the defendant must prove *to the jury's satisfaction* he did not shoot Ashe with malice, and to excuse the killing entirely on the ground of self defense, the defendant must prove *to the jury's satisfaction* that he killed Ashe in self defense, the elements of which were correctly defined.

At first glance it seems inconsistent and contradictory to instruct the jury that the State has the burden to prove beyond a reasonable doubt the presence of malice and absence of the justification of self defense and the defendant has the burden of proving *to the satisfaction of the jury* the absence of malice or the presence of the justification of self defense. This Court has, however, held to the contrary many times, the harmonizing factor lying in the meaning of the term "to the satisfaction of the jury."

44 In *State v. Freeman*, 275 N.C. 662, 666, 170 S.E. 2d 461, Justice Sharp, now Chief Justice, speaking for a unanimous Court, said:

> "These cases [citations omitted] enunciate and reiterate the rule—established in our law for over one hundred years, *State v. Willis*, 63 N.C. 26 (1868)—that when the burden rests upon an accused to establish an affirmative defense or to rebut the presumption of malice which the evidence has raised against him, the *quantum* of proof is to the satisfaction of the jury—not by the greater weight of the evidence nor beyond a reasonable doubt—*but simply to the satisfaction of the jury.*"

In Stansbury, North Carolina Evidence (Brandis Revision), § 214, it is said that proving the presence of self defense or the absence of malice "to the satisfaction of the jury" does not require a showing "by the greater weight of the evidence."

If the defendant can satisfy this requirement by less than the "greater weight" of the evidence; that is by less persuasive, less convincing evidence than would be sufficient to tip the scales ever so slightly in his favor, how can it be said that the burden *of proof* "has been put upon him?" The burden of proof

is the *burden* to persuade the mind, to convince. A burden less than this can only be a burden to establish a reasonable, rational doubt. Thus, there is no inconsistency in telling the jury that, to convict the defendant of second degree murder, the State must prove presence of malice and absence of justification (self defense) beyond a reasonable doubt and, although the State has proved, beyond a reasonable doubt, an intentional killing with a deadly weapon, the defendant must be acquitted of that charge if he has *satisfied* the jury of the absence of malice or the presence of justification (self defense).

Admittedly, the jury cannot be expected to know what this Court has said proof "to the satisfaction of the jury" does not mean. The question is whether the jury could have been misled by what the trial judge told them in his charge *in this case*. As above stated, he clearly and unequivocally told the jury they must find the defendant not guilty of second degree murder unless the State had proved *beyond a reasonable doubt* every element of that crime, including the presence of malice and the absence of justification (self defense). In my opinion,

45 the jury which found this defendant guilty of second degree murder could not have been confused about this, and the charge of the court, which is a correct statement of the law of this State, did not in any way place upon the defendant a burden of proof forbidden by the Due Process Clause of the Fourteenth Amendment as now construed in *Mullaney v. Wilbur, supra*. I, therefore, concur in the majority's conclusion that this defendant is not entitled to a new trial.

No. 75–6568

Johnnie B. Hankerson, PETITIONER,

v.

North Carolina

ON PETITION FOR WRIT OF CERTIORARI TO the Supreme Court of the State of North Carolina.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

OCTOBER 4, 1976.

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